IN THE

Supreme Court of the United States

October Term, 1962

No. 140

NATHAN WILLNER,

Petitioner-Appellant,

—v—

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent-Appellee.

BRIEF OF PETITIONER-APPELLANT, IN OPPOSITION TO MOTION TO DISMISS

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Counsel for petitioner-appellant, who is writing this brief, has been practicing law, actively and continuously, for more than sixty years. Over those years, he has opposed thousands of motions—a large number of them, absurd and without merit, but not one, as absurd and lacking merit as the one at Bar.

Since the motion is based on Mr. Cohen's moving affidavit, we deem it proper to treat it as a formal brief. Mr. Cohen is an assistant attorney general of the State of New York, and in charge of the case.

Our petition for certiorari was based solely on the fact that Willner was denied the right to confront his accusers, and therefore denied the right to cross examine them, and thereby denied a fair trial—in fact, any sort of a trial. By reason of which, his constitutional rights under the Fifth and Fourteenth Amendments of the Federal Constitution were violated. Mr. Cohen does not deny that confrontation was denied and nowhere in his affidavit does he offer any

reason or argument for the denial, but bases his motion on the omission of a transcript, which at most was a trivial technical omission, not material or relevant to the constitutional question of the right of confrontation.

So, Mr. Cohen, about three and a half months after certiorari was issued seized on the fact that we failed to file a transcript of the record of the case, as required by Rule 21 of the Rules of the Supreme Court.

It has been counsel's experience over the years of law practice that papers to be submitted to a court or judge are first handed to the clerk of the court, whose duty it is to examine it carefully, and if his eagle eye discovers the slightest defect or omission, to hand them back for correction. We assume that our petition for certiorari received the same treatment at the clerk's office of this court, and was deemed flawless. We may also assume that the justices of the court deemed the petition sufficient, otherwise they would not have granted the writ.

The petition was verified by Willner. It relates the basic facts, and if consideration to the substitutes for a transcript in Rule 21 is given, a transcript was wholly unnecessary.

Had the clerk or the justices required a transcript, we would have willingly furnished it.

Subsequent to the issue of certiorari, we prepared and filed in the office of the clerk of this court a certified copy of every paper in the record of the proceeding, from the petition to the Appellate Division which initiated it, to the final order of the Court of Appeals which affirmed the order of the Appellate Division denying Willner's petition. True, they were filed after certiorari was granted, but what actual material difference does that make?

POINT I

The cross motion to dismiss was made more than three months after issue of certiorari. The respondent-appellee is guilty of laches.

Mr. Cohen (p. 4) says:

> "It was not until certiorari had been granted that deponent ascertained that no record or transcript of the proceedings in the New York courts had been filed by the petitioner in connection with the petition for certiorari."

Mr. Cohen is a member of the Supreme Court Bar, and is presumed to be familiar with its rules and practice. Why did he fail to discover our alleged failure to comply with Rule 21 until more than three months after certiorari had been granted? His explanation is like that of a small boy for the low marks on his school report card—wavering, quivering and not convincing—in fact, no excuse at all.

POINT II

Appellee filed a brief in opposition to the grant of certiorari, but did not object for alleged omission to file transcript. Hence it must be deemed to have waived it.

In the Committee's brief filed in opposition to our petition for certiorari, there is no mention of the transcript of the record and of our omission to file it. Had the objection been raised in the brief, we could have applied to the court for leave to file it, *nunc pro tunc*, as of the date of the filing of our petition, which we believe would have been granted. In view of the laches (our Point I) and the fact that the complete record is now on file in the clerk's office, leave to deem the transcript filed as of the date of the filing of the petition could well be granted now, *and we respectfully request the court to do so.*

POINT III

Matter in appellee's brief which has no relevancy to the ground on which it bases its cross motion for dismissal, should be wholly disregarded.

Mr. Cohen on page 5 of his affidavit relates an incident which has no bearing or relevancy to the failure to comply with Rule 21. The purpose—to create prejudice against Willner, Mr. Cohen states that in a civil action Willner testified falsely that he was an active member of a Certified Public Accountants Society. A brief is not an affidavit, but we ask the Court to treat Willner's explanation of the incident as though under oath. It is:

He had been licensed as a Certified Public Accountant by the State of New York on January 1, 1937. He had joined the New York State Society of Certified Public Accountants. This was in the depth of the Depression in the Thirties. He was a beginner. He was married, and in addition to the burden of supporting his family, he contributed to the support of his aged parents. So, he fell behind in payments of his dues, and he was dropped as a member. In that period, members of the most exclusive social clubs experienced similar treatment. Willner knew that he could be restored to membership when he would be in a financial position to pay up, and in fact he was restored to membership in 1951, and also was made a member of the American Institute of Accountants, the recognized national organization of the accounting profession. The action which gave rise to his testimony was an embezzlement charge where he (Willner) had unearthed the syphoning off of the funds of a firm by officers. The court held that Willner's testimony was true and his side won the case. The assertion about Willner came subsequently, he was reinstated to membership and after a member of the Society, a Mr. Rieck, a member of the accounting firm of Haskin & Sells, had signed a statement to the effect that

reinstatement was acceptable and sent Willner a letter confirming it.

But, after all, what has all this to do with the motion to dismiss? All of the matter dragged in his moving affidavit, to quote Gilbert & Sullivan "has nothing to do with the case".

POINT IV

The amended remittitur by the Court of Appeals squarely presents to the Supreme Court the question of the right to confrontation of accusers of a candidate for admission to a state bar.

The pertinent part of the remittitur order reads:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights."

This court has held "that the state may not arbitrarily refuse a person permission to practice law." And it is patently clear that New York has arbitrarily refused Willner admission to the Bar, when it held that refusal of confrontation was not a denial of his constitutional right of due process.

The right of confrontation is a right accorded to every person under an accusation, civil or criminal. A habitual criminal, accused of the commission of an atrocious crime may not be denied the right to confront the witnesses against him. An accepted and recognized right even before the invention of writing. A denial of the right in the twentieth century is an anachronism.

Conclusion

Willner was entitled to admission to the Bar, when he first applied, in 1937. He has been denied admission for a quarter of a century, suffering aggravation, humiliation and financial losses over the years. His family has suffered, as well. To indulge in a colloquialism, "he has been given a raw deal". He is now on the shady side of life, 61, and in the interests of justice, admission to the Bar should not be delayed, but directed forthwith.

Respectfully submitted,

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